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IN THE

Supreme Court of the United States.

NOS. 20-21 ORIGINAL.

COMMONWEALTH OF PENNSYLVANIA,
Complainant,

vs.

STATE OF WEST VIRGINIA,
Defendant.

STATE OF OHIO,
Complainant,

vs.

STATE OF WEST VIRGINIA,
Defendant.

JOINT BRIEF FOR PENNSYLVANIA AND OHIO.

The court has ordered that each of these cases be restored to the docket for reargument with special reference to the questions:

> "(1) Whether the suit was not prematurely brought as no action has been taken either by the State or by the State Commission under the Statute."
>
> "(2) Whether the bill presents a cause justiciable between the two States, parties to the action."

For the reason that the question whether the law of West Virginia is in violation of the Constitution must be answered or an answer to it must be assumed in considering the question whether the bills of complaint in the actions present causes of action justiciable between the States parties thereto, and the question whether the bills of complaint present justiciable causes of action must be answered or an answer assumed in considering the question whether the suits were prematurely brought, it is thought that the argument can be most compactly stated with the least repetition in the order hereinafter indicated.

POINTS.

POINT I. The Act of West Virginia is an unconstitutional interference with established courses of interstate commerce.

POINT II. The Bill of Complaint in each suit presents a cause justiciable between the two States parties to the action.

POINT III. These suits are not prematurely brought.

ARGUMENT.

POINT I.

The Act of West Virginia is an unconstitutional interference with established courses of interstate commerce.

The companies operating in West Virginia that furnish gas for the use of consumers in other States in some instances supply consumers in Pennsylvania and Ohio directly through their own pipe lines and distributing systems in those States. In the main the gas is delivered in West Virginia or at the State line under long term contracts to other companies and is distributed to consumers by the latter companies directly or through subsidiaries or local companies (Record, pp. 1509,-24,-35,-44,-54-60, 1761,-69,-80,-88,-91 1800, 1581-89 1598-1603). The course of the gas from the well to the ultimate consumers in Pennsylvania and Ohio is determined by existing contract relations, public service duties in other States, long-established courses of business and the physical structures adapted thereto. The gas that goes into other States is actually in interstate commerce from the time it leaves the wells until it reaches the ultimate consumers. (*United Fuel Gas Co.* v. *Hallanan,* 87 West Va. 396 (decided by this Court December 12, 1921; *Pennsylvania Gas Company* v. *Public Service Commission,* 252 U. S. 23.)

(1) The whole design of the West Virginia Statute is to divert or retain for the benefit of West Virginia consumers natural gas that in the absence of the statute would go to consumers in the other

States through these established channels of interstate commerce. This intention is made manifest:

(*a*) By the consideration of the extent and character of the industry to which it applies, from which it appears that the full supply of gas that the statute requires to be furnished can be furnished only at the expense of consumers in other States. (See statement of facts in briefs submitted on original argument.)

(*b*) By the history of the efforts of other States and of West Virginia to secure for themselves the exclusive or preferential enjoyment of their natural products, of which the present act is the logical development. (*West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 and cases there cited; *United Fuel Gas Co.* v. *Hallanan*, decided by this Court December 12, 1921; testimony of Governor Cornwell, Rec. pp. 1194 to 1197).

(*c*) By the very terms of the act, which in effect if not in words, require that all gas produced in West Virginia shall be supplied to West Virginia consumers so far as they want it for any purpose, domestic, industrial, or other.

(*d*) By the admissions in the answers which in effect state that the purpose of the act is to supply fully the requirements of West Virginia consumers out of the abundance of gas produced in the State now going to supply consumers in other States. (See pp. 7, 26, 30-1 and 33 of the answers.)

The claim set up in the answers that West Virginia's purpose is only to secure adequate service for her own citizens calls for the supplement that she intends to secure it at the expense of consumers in other States.

(2) The statute, to the extent that it requires natural gas that otherwise would go to other States to be diverted or retained for the use of West Virginia consumers, is equivalent to a prohibition upon the transmission of such gas to such other States and is void as a discrimination against interstate commerce. (*West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, and cases there cited; *Ward* v. *Maryland*, 12 Wall. 418; *Woodruff* v. *Parham*, 8 Wall. 123; *Welton* v. *Missouri*, 91 U. S. 275; *Guy* v. *Baltimore*, 100 U. S. 434; *Walling* v. *Michigan*, 116 U. S. 446; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78.)

It may be conceded that State regulations that have to do primarily with matters of local concern, calling imperatively for regulation and that do not discriminate against or burden interstate commerce, are unobjectionable. (*Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23.) It is an open question, not involved in this case, whether West Virginia, in the absence of Congressional action, could prescribe regulations more directly affecting interstate commerce and designed to secure equality among consumers and the most advantageous use of the gas produced in her borders irrespective of State lines, for example, regulations designed to secure a preference for domestic consumers everywhere over industrial consumers. There is no discrimination in favor of consumers in Pennsylvania and Ohio and the act under consideration is not designed to prevent such discrimination. Its intention and necessary effect are to produce discrimination in favor of West Virginia.

(3) The defense that is set up by West Virginia to the claim of the plaintiff States as to the inten-

tion and necessary effect of the act in question is in the nature of confession and avoidance. The intention and necessary effect are substantially admitted to be as asserted by the plaintiff States. The contention is set up that the act is, nevertheless, justifiable as a proper exercise by the State of control over its own public utility corporations.

Let it be assumed for the moment that the act is in fact an attempt by the State to accomplish its object by the exercise of control over its public utility corporations. It is to be considered whether on this hypothesis the act can be justified either (*a*) on the ground that it is merely declaratory of a duty already existing, or (*b*) on the ground that the State has the right to impose new duties on public utility corporations of its creation or which it permits to do business within the State.

(*a*) The theory that there was an antecedent duty resting on the natural gas companies in West Virginia to supply fully the requirements of their West Virginia consumers before supplying gas for the use of consumers in other States does not rest on any special provisions contained in their charters, or on any contract obligations into which they have entered. The pre-existing obligation, if any, must be inferred from the fact that the companies in question had the power of eminent domain under the West Virginia law and were engaged in the business of supplying gas to the public in West Virginia.

The obligations of the companies in West Virginia to supply gas for the use of consumers in Pennsylvania and Ohio were assumed before there

was any question of the sufficiency of their supplies of gas both to meet fully the requirements of their West Virginia consumers and to meet fully the obligations assumed by them to furnish gas to or for the use of consumers in other States. If the order in time of the assumption of obligations were a matter of importance, the fact is that in large measure the obligations to furnish gas for use in other States antedated the obligations assumed to furnish gas in West Virginia. But it is believed that the order in time is of no consequence. The public service duties in West Virginia and elsewhere and the contract obligations were rightfully undertaken and were on a parity. When, by reason of subsequent events, the supply of gas has become insufficient to meet fully the wants of West Virginia consumers and the commitments for the supply of consumers in other States, the burden of the shortage must be borne on an equitable basis that recognizes this parity of obligation.

The fact that the companies in West Virginia were organized under the laws of that State, or were permitted to do business there and were given the power of eminent domain or were denominated common carriers does not invalidate contracts made by them to deliver gas in interstate commerce or import into their interstate contracts and commitments a condition that they shall be subject to a prior obligation on the part of the West Virginia companies to supply fully the requirements of West Virginia consumers. A railroad organized under the laws of a State and engaging in interstate commerce is not under an implied duty to devote its facilities to meeting fully the requirements of intrastate traffic in case they are insufficient to fully meet

both intrastate and interstate requirements. If its freight trains have not sufficient capacity to carry all the freight that is offered, intrastate freight is entitled to no preference. If it can supply only part of the demand for coal cars, the shipments destined to points within the State are not taken care of first. A gas company or other public service company which has extended its service to another district, or has taken on additional consumers, being at the time amply able to meet all demands upon it, stands in like relation to all its consumers, and if afterwards, because of decrease in supply or increase in demand, it is unable to meet fully the demands of all, the situation must be dealt with on the basis of equality of right.

The question has been asked whether a public service corporation has the right to disable itself from performing its public duties by entering into interstate contracts. A similar question is whether a railroad may disable itself from performing its duties to the State of its creation by extending its lines into another State and assuming duties in interstate commerce. The answer in each case is alike. Neither a public service corporation nor other corporation should assume obligations that it is unable to perform. But the situation here does not concern the propriety of a public service corporation's extending its service or entering into contracts and commitments that will interfere with its due performance of the public service duties to which it is already subject, but has to do with a system that already exists and has existed for many years and has supplied adequate service in all the States alike.

(*b*) The act cannot be sustained on the ground that it is the exercise by West Virginia of a right to impose new duties on corporations of her creation or which she permits to do business within the State, or on any similar ground.

The question whether West Virginia might originally have imposed upon corporations of her creation or upon corporations which she permitted to do business within the State the condition that they should supply fully the requirements of West Virginia consumers before taking any gas out of the State is not involved. On principle the validity of such a statute may well be doubted. There is here, however, an existing system of interstate contracts, an established course and flow of interstate commerce, and West Virginia cannot under the guise of imposing new duties on corporations of her creation or new conditions on foreign corporations doing business within the State work a discrimination against or impose burdens upon this interstate commerce. (*Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1.)

(4) The West Virginia statute in fact applies to individuals and partnerships as well as to corporations; it applies not only to those who are engaged in the business of furnishing gas to the public, but to all those who are furnishing or are required by the common law or by statute to furnish gas for the use of the public or any part of the public; it requires every person or corporation who is furnishing gas in any place to furnish it in every place that can be reached directly or indirectly by the lines of such person or corporation, and every person, firm or corporation who is furnishing gas for special purposes to furnish it for all purposes. It fastens not

merely upon part but upon all the gas produced by any of the persons named, "to the extent of his supply produced in this state". It gives to the West Virginia consumer a preferential right which in times of scarcity must surely blossom into absolute monopoly. It can be sustained only on the theory that the right of all the persons and corporations to whom it applies to engage in interstate commerce in natural gas and all contracts entered into by them in furtherance of such commerce are subject to the prior performance by such persons and corporations of every obligation in favor of West Virginia consumers that the legislature of West Virginia may see fit at any time to impose. But such a theory substantially claims for West Virginia the right to refuse to allow her natural gas to be taken out of the State, which was the very right denied to Oklahoma in *West* v. *Kansas Natural Gas Company*, 221 U. S. 229.

(5) The suggestion has been made that the legislation of West Virginia attaches to the gas in the hands of the companies in West Virginia before it has started in interstate commerce and that, therefore, it begins its interstate commerce course charged with the obligation that the State legislation creates. There is no time after the gas comes into the possession of the companies in West Virginia when it is not in interstate commerce. When it first comes out of the ground or is first purchased from the local producer it comes into the possession of the public utility company, dedicated, so far as concerns the proportion thereof necessary to fulfill interstate contracts and obligations, to interstate commerce. The proportion that has an interstate destination is fixed from the first moment by exist-

ing contracts and relations. (*United Fuel Gas Co.* v. *Hallanan,* 87 W. Va., 396, decided by this Court December 12, 1921).

(6) But it may be said that the obligation of the statute goes back of the production or purchase by the West Virginia utility company, so that the gas first comes into existence as a possible subject of interstate commerce already charged with the obligation created by the statute. The answer to this suggestion is that the commerce clause is not confined in its operation to commodities in transit in interstate commerce. It renders void legislation that would forbid the putting of property into interstate commerce or the acquisition of property for delivery in fulfillment of interstate commerce contracts just as effectively as it renders void legislation interfering with the transportation of goods after they are in interstate commerce. The State may put many restrictions upon the production of gas, or on the manufacture of beer or on any other subjects of production and manufacture; it may in the exercise of its police powers prohibit altogether the manufacture of things deemed noxious and any resulting effect on interstate commerce is indirect and incidental; but if the State permits the production, or creation, or acquisition of a subject of commerce, it cannot limit such subject of commerce to intrastate commerce. It can no more by discriminatory legislation forbid the creation of a subject of interstate commerce than it can forbid its transportation.

As pointed out in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, the case of *Geer* v. *Connecticut,* 161 U. S. 519, dealing with animals *ferœ naturæ,* does not controvert this established principle.

POINT II.

The bill of complaint in each case presents a cause justiciable between the two States parties to the action.

This subject will be considered under the following heads:

I. The nature of the cause presented.

II. The cause falls within the class of causes justiciable between States.

III. The cause of action is one that each plaintiff State has a right to maintain in its own right and on behalf of its citizens.

IV. The cause of action is one in respect to which the defendant State is not immune from suit.

I. The nature of the cause presented.

Pennsylvania and Ohio sue to protect themselves and their citizens in the enjoyment of the natural gas service that has grown up under the free flow of interstate commerce against interference with that service by the wrongful act of West Virginia. The right they assert is their right and the rights of their citizens to receive natural gas that would come to them in the ordinary course of interstate commerce following its accustomed channels and unimpeded by any illegal obstruction. They do not set up any title by contract or grant in the gas produced in West Virginia, but each State rests its cause on the fact that there has grown up and is established a definite course of interstate commerce through the pipe line companies of West

Virginia and the distributing systems in the plaintiff State, on which its institutions and inhabitants are dependent for their supply of fuel and which course of interstate commerce is threatened by the act of West Virginia. In a broad sense, the unlawful obstruction of interstate commerce threatened by West Virginia would constitute a nuisance, which each State has the right to have enjoined. The cause presents all the elements necessary to sustain an ordinary cause of action between individuals, to wit, a wrongful and unlawful act and special injury. The relation of cause and effect between the act threatened by West Virginia and the injury to the plaintiff States and their citizens would be immediate, whether the gas passes from its source in West Virginia to the consumers in the plaintiff States through the lines of a single company, or successively through the lines of several companies, and whatever the arrangements may be between the successive companies through whose lines it may pass. It is sufficient that the course of the gas from its source in West Virginia to the consumers in the plaintiff States is so fixed by existing facilities, business arrangements, contracts and custom as to establish the relation of cause and effect between the threatened interference on the part of West Virginia and the apprehended injury to the plaintiff States and their citizens.

II. The cause falls within the class of controversies justiciable between States.

The genesis and history of the Judiciary Article, and the sweeping terms in which jurisdiction over controversies between the States has been conferred have been the subject of repeated discussion by this Court (*Rhode Island* v. *Massachusetts,* 12

Pet. 657; *Missouri* v. *Illinois,* 180 U. S. 208; *Kansas* v. *Colorado,* 185 U. S. 125; *Federalist,* LXXX).

The Court has studiously refrained, however, from attempting to mark the ultimate boundaries of its power, saying in *Missouri* v. *Illinois,* 180 U. S. 208-241:

> "It would be objectionable, and, indeed, impossible, for the court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court."

The decisions indicate that the jurisdiction embraces every controversy between States determinable by any existing or discoverable rule which may be deemed to fix their relative rights; in other words, every controversy which if it arose between independent States might be determined by arbitration and even controversies which as between independent States would not be justiciable because involving questions of independence or sovereignty or other matters of vital interest. Indeed, it would seem that the jurisdiction must include every controversy growing out of a grievance of one State against another, for a State asserting a grievance must base it upon the violation of some existing or assumed principle fixing their relative rights. If the principle exists and the violation is proved, a cause of action is made out; while if the principle does not exist, judgment must go against the complaining State upon the merits.

Cohens v. *Virginia,* 6 Wheat. 264;
Rhode Island v. *Massachusetts,* 12 Pet. 657;
Kansas v. *Colorado,* 206 U. S. 46.

But whatever limits there may be upon the jurisdiction of the Supreme Court in controversies between States to which no existing rule of international or municipal law is applicable, the decided cases appear clearly to establish that every controversy between States is justiciable when (1) it involves a claim which if it arose between independent sovereignties might properly be prosecuted by diplomatic representation, reprisal or war and (2) which is determinable by existing rules of international or municipal law.

Missouri v. *Illinois and the Sanitary District of Chicago,* 180 U. S. 208; 200 U. S. 496.

Kansas v. *Colorado,* 185 U. S. 125; 206 U. S. 46.

Georgia v. *Tennessee Copper Co.,* 206 U. S. 230; 237 U. S. 474.

New York v. *New Jersey,* 256 U. S., decided May 2nd, 1921.

The controversies between Pennsylvania and West Virginia and between Ohio and West Virginia are clearly justiciable within the principles so established. In each case there is a controversy between two States, involving a grievance asserted by one against the other. The asserted grievance is that the State complained against is threatening to do something that is forbidden by the Constitution governing the relations between the States and which will cause injury to the complaining State and its citizens. The Constitution itself and a long line of decisions interpreting the meaning of the Commerce Clause furnish the rules of law for the determination of the controversy.

Granted a treaty between two independent States, establishing entire freedom of trade between their citizens, legislation by one seeking to prohibit the export to the other of raw materials essential to industries that had grown up on the faith of the treaty, would give rise to a controversy between them which in ordinary course would be prosecuted by diplomatic representations, reprisal in kind and possibly by war. The treaty and rules of International law applicable to its construction would furnish the rules for the determination of the controversy, and such a controversy would be universally recognized as a proper subject for arbitration.

Nor can it be out of place to mark that rights of access to raw materials and natural resources have always been among the most fruitful subjects of international quarrels, controversies and wars. It is not even necessary to resort to ancient or to Colonial history for illustrations: The iron beds and potash of Alsace and Lorraine; the coal fields of Silesia and the Sarre; the gold mines of the Rand; and, coming nearer home, the petroleum deposits of Mexico, all have their lessons. What has created the problems of the Far East more than the question of an open door or a closed one to the undeveloped natural resources of China and Siberia? What else underlay our long quarrel with Great Britain over the Atlantic fisheries? And have we not but yesterday been engaged in diplomatic protests to Great Britain and to Holland against an exclusive policy in the production of petroleum from their territories, accompanied in each case by more than a hint of possible reprisal?

This court is certainly not prepared to say that its jurisdiction over controversies between States

is more limited than would be the jurisdiction of an international court of arbitration over independent nations who had conferred upon it jurisdiction to arbitrate all controversies determinable according to accepted principles of law and equity. The jurisdiction of such a court of arbitration would surely extend to a controversy between independent States involving the factors apparent in the causes presented by Pennsylvania and Ohio against West Virginia.

III. The cause of action is one that each plaintiff State has a right to maintain in its own right and on behalf of its citizens.

The right of the plaintiff States to sue has been questioned on the ground that they are not proper parties to the controversy. It is said that they may not sue to redress the individual grievances of their citizens and that even as representing the public they may not sue to prevent interference with interstate commerce, because in matters of interstate commerce the public is represented not by the States but by the Nation.

(*a*) To the suggestion that the suit cannot be maintained because it is brought to redress the grievance of individual citizens there are two answers: (1) Each of the plaintiff States sues as well in its own behalf in the capacity of owner and proprietor of its institutions, etc. and guardian of their inmates as in the capacity of representative or *parens patriæ* of its citizens: (2) In suing in a representative capacity the States do not represent individual citizens but the consuming public served by the public utilities companies that derive their gas from West Virginia.

(1) In the brief filed in behalf of West Virginia on the original argument it was sought to minimize and then ignore the interest that the plaintiff States in their corporate capacity have in the controversies. But the interest is substantial and cannot be ignored. If the actions were prosecuted solely to protect this interest from injury there would unquestionably be a substantial controversy presented, calling for the exercise by the Court of its jurisdiction. The interest of the plaintiff States as proprietors in these causes makes very pertinent the decision of this Court in *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 11 How. 528; 13 How. 518, and 18 How. 421. The court found in 13 How. 518, that Pennsylvania was not a party to its suit to enjoin the erection and maintenance of the Wheeling Bridge by virtue of its sovereignty but because it had expended large sums of money in building piers, canals and railways and other public improvements on the Ohio river the use of which would be much interfered with if the passage of the river were blocked by the bridge. Attention may incidentally be called to the fact that the relation of cause and effect between the action threatened by West Virginia and the apprehended injury to the proprietary interests of the plaintiff States is, to say the least, quite as obvious and quite as direct as the like relation between the Wheeling Bridge and the anticipated loss to Pennsylvania.

(2) While a State may not sue in this court to promote purely private interests, it may properly sue to protect the health and comfort of its inhabitants and the value of their property, though in its sovereign capacity or in its capacity as proprietor

it has no interest in the controversy, and though the danger it seeks to avert does not threaten all of its inhabitants, or does not threaten all of them in like degree. *Missouri* v. *Illinois*, 180 U. S. 208, 200 U. S. 496; *Kansas* v. *Colorado*, 185 U. S. 125, 206 U. S. 46, and *New York* v. *New Jersey*, 256 U. S., decided May 2nd 1921. The line between the cases in which a State may bring suit as representative of its citizens and the cases in which it will be regarded as not a real party to the controversy is not hard to find. A State may not use its power of eminent domain or its taxing power for the benefit of an individual or for the benefit of defined individuals, however numerous. It may, however, use its power of eminent domain and its taxing power for the benefit of the public. But the public does not mean necessarily all the people. So a State may maintain a suit for the benefit of the public though the public immediately concerned is less than all. The same principles that determine in other fields of action what are public and what are private purposes will serve to determine the cases in which a State may sue as representative of its citizens. Pennsylvania and Ohio sue for the benefit of all their citizens who are or may be dependent on the public service companies obtaining their supplies of natural gas from West Virginia. These citizens constitute the same public in whose behalf these States authorize their public service companies to exercise the power of eminent domain, and in whose behalf they assume the right to regulate the rates and service of the public service companies. This great class, including a great proportion of the population of each State, must be regarded not as the mere sum of the individuals of which it is at any given time com-

posed, but as a part or factor of the community itself. The plaintiff States, therefore, maintain these actions not on behalf of individuals but each State maintains its action as representative of its public and has a right so to do.

(*b*) The argument that the plaintiff States cannot represent their people in suits based on the Commerce Clause of the Constitution is supposed to be supported by the authority of *Louisiana* vs. *Texas*, 176 U. S. 1. In reference to the suggestion it is to be said: (1) The fact that the States sue to protect their own proprietary rights as well as in a representative capacity renders the suggestion irrelevant; (2) *Louisiana* v. *Texas* does not lay down the rule supposed to be found in it; (3) a State may maintain a suit to prevent injury to its people through a violation of the Interstate Commerce Clause of the Constitution where its people have a special interest to be protected; (4) the people of each of the plaintiff States have a special interest to be protected which it is peculiarly the duty of their respective States to protect in their behalf.

(1) It is too late to question the right of a State to maintain a suit in this Court based on the Interstate Commerce Clause of the Constitution to protect its own proprietary rights.

> *Pennsylvania* v. *Wheeling and Belmont Bridge Company*, 9 How. 647; 11 How. 528; 13 How. 518; 18 How. 421.

(2) *Louisiana* vs. *Texas*, 176 U. S. 1, does not hold that in matters of Interstate Commerce the Nation and not the State is *parens patriæ* and guardian of the rights of the people to the exclusion of the

States. The theory that in matters of Interstate Commerce the people are not people of the several States but people of the country as a whole and that in such matters they may not look to their States for protection and their States may not intervene to protect them is interesting but it is not approved or even formulated in *Louisiana* vs. *Texas*.

Louisiana v. *Texas* was an action brought by the former State against the latter to enjoin the enforcement of quarantine regulations which according to the bill were adopted with the intention and had the effect of prohibiting entirely commerce between New Orleans and Texas. There was a demurrer to the bill, the fourth ground being; "Because it appears from the face of said bill that the State of Louisiana, in her right of sovereignty, is seeking to maintain this suit for the redress of the supposed wrongs of her citizens in regard to interstate commerce, while under the Constitution and laws the said State possesses no such soverignty as empowers her to bring an original suit in this Court for such purpose."

Chief Justice Fuller, in delivering the opinion of the Court, points out (p. 19) that Louisiana presents herself in the attitude of *parens patriæ*, trustee, guardian or representative of all her citizens and that "Inasmuch as the vindication of the freedom of Interstate Commerce is not committed to the State of Louisiana and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citi-

zens at large." But the Chief Justice does not pass upon the right to sue thus stated by him to be asserted by Louisiana. He takes up at once the liability of Texas to be sued and finds that upon the facts stated in the bill Texas was not liable or responsible for the grievances complained of by Louisiana. Mr. Justice White concurred in the result, but did not indicate the grounds of his opinion. Mr. Justice Brown concurred in the result solely on the ground that the bill did not allege the stoppage of all commerce between the State of Louisiana and the State of Texas, but only between the City of New Orleans and the State of Texas and that the controversy, therefore, was not one in which the citizens of Louisiana generally could be assumed to be interested but only the citizens of New Orleans. Mr. Justice Harlan, who spoke only for himself, also concurred in the result but wholly rejected the views expressed in the opinion of the Court. He held that Texas was liable for the acts of which complaint was made, but that Louisiana could not maintain a suit to redress this grievance (p. 24). He does not expressly refer to the fourth ground of demurrer and bases his conclusion on the view that Louisiana is to be regarded as attempting to maintain a suit for the redress of grievances of individual citizens, contrary to the principle of *New Hampshire* v. *Louisiana*, 108 U. S. 76. He declares emphatically that the Constitution does not authorize one State to bring another State before the Supreme Court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or the powers of the Complaining State in its sovereign or corporate capacity, but which at most affects only the rights of individual citizens or corporations en-

gaged in interstate commerce. He points out that Louisiana is charged with no duty and has no power to regulate interstate commerce. But he does not undertake to say that there may not be a public of a State specially affected by an interference with interstate commerce whom the State may properly bring suit to protect, nor does he say that an interference with interstate commerce cannot so affect the people of a State as to give the State the right to sue for their protection.

The citizens of Louisiana, on whose behalf that State sought to maintain her suit against Texas, were not affected by the action of Texas in their health, or comfort, or in their homes, or in any aspect of their lives with which Louisiana was concerned, but only in their right to engage in profitable commerce with Texas. Mr. Justice Harlan may well have considered that in this aspect they were to be regarded not as a section of the people of Louisiana, but as an aggregation of private individuals. To put the matter somewhat differently, Judge Harlan may have considered that a State cannot prosecute on behalf of its people a suit to abate a public nuisance under the Constitution and laws of the United States without showing special injury to the interests of its people with which it is concerned. This was not a new idea, but had already been suggested in the case of *South Carolina* v. *Georgia,* 93 U. S. 4, at page 14, and in *Pennsylvania* v. *Wheeling Belmont Bridge Co.,* 13 Howard, 518.

(3) A State may maintain, as representative of its people, a suit based on the Interstate Commerce Clause where its people have a special interest to be protected.

It must be recognized that sound policy underlies

Justice Harlan's statement that "When the Constitution gave this Court jurisdiction of controversies between States, it did not thereby authorize a State to bring another State to the bar of this Court for the purpose of testing the constitutionality of local statutes or regulations that do not affect the property or powers of the complaining State in its sovereign or corporate capacity but which affect at most the rights of individual citizens or corporations engaged in interstate commerce." It would, indeed, be intolerable if every statute of a State that operated to the disadvantage of citizens of another State and seemed to be contrary to the Commerce Clause might be made the basis of a suit in this Court by the State whose citizens are affected to test its constitutionality. It is not credible that this Court, under ordinary circumstances, would entertain a suit by Virginia to have declared unconstitutional a West Virginia tax on coal shipped out of the State on the ground that it was an unconstitutional burden on Virginia consumers of West Virginia coal. The general rule must be that suits to test the constitutionality of the laws of the several States, alleged to be contrary to the Commerce Clause, must be brought by the individuals affected, whether they are citizens of the State enacting the unconstitutional statute or citizens of another State and even though a similar dispute affecting a citizen of a foreign State and arising out of a violation of a treaty right might properly be made the basis of diplomatic representations or even of reprisal. But, on the other hand, if West Virginia should by express enactment prohibit the shipment to Virginia of any coal until, let us say, Virginia consented to join in some common enterprise, would Virginia

be unable to obtain relief for its citizens otherwise than by reprisal in kind?

This question is not put because it is assumed that the answer to it is self-evident, but to bring out the fact that there must be a stage at which the people of a State as such will have such a special interest in a question arising under the Commerce Clause that the right of the State to bring suit as their representative must be recognized.

The underlying principle is clear: The Commerce clause establishes, in the absence of Congressional action to the contrary, the right to free trade between the States. It is a right which is the subject no less of judicial than of legislative protection. Whenever it is interfered with by State action, those injured, whether individuals or a State in its proprietary capacity, are entitled to resort to the courts for relief. In addition a State may sue as the representative of her citizens when there is special injury done or threatened to the special public whose interest and welfare it is the function of the State to safeguard.

(4) The people of each of the plaintiff States have a special interest to be protected which it is peculiarly the duty of their respective States to protect in their behalf.

The public of Pennsylvania and Ohio, whom the plaintiff States represent in these suits, is not a fortuitous collection of individuals linked together only by the fact that they are each and all injuriously affected by West Virginia's interference with interstate commerce. They are consumers of natural gas served by the public utility systems of Pennsylvania and Ohio. They are, as has been said before, the public of Pennsylvania and Ohio

in such sense that those States could rightfully exert for their benefit their taxing power and their power of eminent domain. While it may not be the function of the States to vindicate the mere commercial or trading right of their people to carry on interstate commerce free from interference by another State, it is the function of the States to protect their people in the enjoyment of proper public service affecting their health, comfort and welfare, and, therefore, if a proper supply of a necessary such as fuel is illegally interrupted by the illegal act of another State, the State has a right on behalf of its consuming public to take proper measures by suit or otherwise to enjoin or abate such illegal interference. In the present cases, the law of West Virginia, of which Pennsylvania and Ohio complain, directly interferes with a long established and definite course of interstate commerce upon the continuance of which the public of Pennsylvania and Ohio is directly and demonstrably dependent for gas not merely as traders but as members of the consuming public which has the right to look to the State for protection.

IV. The State of West Virginia is not immune from suit for the cause set out in the Bill of Complaint.

The law of West Virginia is wrongful; through its effect upon an established and definite course of interstate commerce it reaches into the territory of the plaintiff States, and there does injury to the plaintiff States and their citizens. The liability of West Virginia to suit rests upon the same principle that led the Court in *Kansas* v. *Colorado* (206 U. S. 46, at pp. 97 and 98), to declare that "when

ever the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and limitations of the rights of the two States becomes a matter of justiciable dispute between them." The day has long since passed when it might have been open to West Virginia to argue that inasmuch as the law which the plaintiff States call in question is a law laying down a rule defining the rights and duties of persons and corporations subject to her jurisdiction, it is an exercise of sovereignty over her domestic affairs of which no other State has a right to complain. *Rhode Island* v. *Massachusetts* (12 Pet. 657), determined for all time that controversies between States are not excluded from the cognizance of this Court because they involve questions that are political in their nature, and *Missouri* v. *Illinois,* 180 U. S. 208, 200 U. S. 496; *Kansas* vs. *Colorado,* 185 U. S. 125, 206 U. S. 46, and *New York* v. *New Jersey,* 256 U. S., decided May 2nd, 1921, are illustrations of the fact that a State is not immune from suit on account of the extra-territorial effect of its own laws, because such laws also immediately affect persons or property within its own jurisdiction, and have a final object which if sought to be attained by lawful means would be a proper aim for State legislation.

POINT III.

These suits are not prematurely brought.

(A) The uniform principle of this Court in controversies between States has been that no technical rule of practice or procedure should be permitted to interfere with the determination of such a cause according to the substantial rights of the parties upon the broadest principles of justice. *Virginia* v. *West Virginia*, 234 U. S. 117, 121; *Rhode Island* v. *Massachusetts*, 14 Pet. 210; *Kansas* v. *Colorado*, 185 U. S. 125, at page 145; *New York* v. *New Jersey*, 256 U. S., decided May 2nd, 1921). The only ground upon which the Court could consistently with this principle dismiss these actions as prematurely brought would be that there is no certainty in the absence of actual experiment that the act complained of would so operate as to impair the rights of the plaintiff States and their citizens. The fact that the act complained of, if allowed to operate, will so operate as to deprive the plaintiff States and their citizens of natural gas which they need and would get but for the act does not admit of serious dispute. If the contentions of the plaintiff States on the merits are well founded, their rights and the rights of their citizens will be violated if the act results in the diversion to West Virginia consumers of any gas which the plaintiff States and their consumers need and would get but for the act, whether the amount of gas so diverted and the consequent injury to the complaining States is great or small. But upon the pleadings and the evidence there is no doubt in fact that the operation of the act will produce effects of the kind that the

plaintiff States apprehend and that these effects will be produced immediately and in substantial degree. The only new knowledge that would be obtained through the actual operation of the statute would concern the extent of the harm the statute would do immediately and the time it would take to produce its full effect. On the other hand, the operation of the statute during any period would cause irreparable injury.

There is no room here for the application of the principle frequently applied in rate cases, that where, in advance of actual experiment, there is no certainty that the rate attacked as confiscatory will actually prove to be confiscatory, the court will not grant an injunction but will await the result of actual experiment. (*Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19). The difference between those cases and these is fundamental. There, the question whether the acts attacked are in fact unconstitutional depends upon the degree of the effect that will be produced upon the revenues of the complainants. Here, the act of West Virginia is unconstitutional irrespective of the degree of effect which it will produce. It violates the rights of the plaintiff States and their citizens, whether the degree to which it will affect them is great or small. Likewise the reasons that lead the court to dismiss the bill in (*Kansas* v. *Colorado*, 206 U. S. 46), have no place here. The court there dismissed the bill on the merits because it reached the conclusion that Colorado was not taking a greater share of the flow of the Arkansas River than upon just and equitable principles she was entitled to take. But *Missouri* v. *Illinois*, (180 U. S. 208), does bear directly on the question of prematureness. Mr. Justice Shiras, delivering the opinion of the court, replied (at p.

242) to the contention on the part of the defendant State that the suit was prematurely brought, in the following language:

> "This proposition is sought to be maintained by several considerations. In the first place, it is urged that the drawing, by artificial means, of the sewage of the City of Chicago into the Mississippi River may or may not become a nuisance to the inhabitants, cities and towns of Missouri; that the injuries apprehended are merely eventual or contingent, and may, in fact, never be inflicted. Can it be gravely contended that there are no preventive remedies, by way of injunction or otherwise, against injuries not inflicted or experienced, but which would appear to be the natural result of acts of the defendant, which he admits or avows it to be his intention to commit?"

(B) But the plaintiff States do not have to claim the benefit of the special principles that apply in actions between States. Tested by the strict technical rules of practice that prevail in suits brought by individuals, these actions are not prematurely brought.

The act of West Virginia constitutes a definite threat that the provisions of the act will be enforced.

The first section of the act is as follows:

> "Section 1. That every person engaged in furnishing, or required by law (whether statutory or common law) to furnish, natural gas for public use, or for the use of the public, or any part of the public, whether for domestic, industrial or other consumption, within this state, shall to the extent of his supply of said gas produced in this state, (whether produced by said person or by any other person), furnish for public use within the territory of this State,

and for the use of the public and every part of the public within the territory of this State, in or from which such gas is produced, or through which said gas is transported, or which is served by such person, a supply of natural gas reasonably adequate for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed or desired to be consumed by the public, or any part of the public, within said territory in this State, and for which said consumer or consumers therein shall apply and be ready and willing to make payment at lawful rates."

Sec. 2 authorizes the Public Service Commission to compel one public utility to supply gas to another on its lines or within its territory unless it is itself willing to supply gas directly to the consumers of the latter. Sec. 3 extends the general powers of the Public Service Commission to cover the subject matter of the act. Sec. 4 authorizes any person aggrieved or affected by any violation of the act to complain to the Public Service Commission, and also authorizes any person affected or the Public Service Commission itself to apply to the courts to enforce the performance of the act, pending proceedings before the Commission. Sec. 5 imposes heavy penalties for failure to comply with any requirement of the Commission and if the person in default is a corporation makes the officers of such corporation personally liable. It declares that "every day during which any person, or any officer, agent or employee of such person, shall fail to observe and comply with any order or direction of the Commission, or to perform any duty enjoined by this act, shall constitute a separate and distinct violation of such order or direction of this act, as the case may be." Sec. 6 provides

that any person claiming to be damaged by any violation of the act may bring suit in his own behalf for the recovery of the damage from the person or persons guilty of the violation. Sec. 7 defines the word "person" to include persons, firms and corporations.

The duty which Sec. 1 of the Act imposes is absolute and is irrespective of any action by the Public Service Commission. A failure to observe the duty would be a violation of the act within the meaning of Sec. 6, and would be the basis of an action for damages. The Public Service Commission upon application must enforce the performance of the duties imposed by Sec. 1. Both in enforcing the performance of the duties imposed by Sec. 1 and in exercising the powers conferred upon it by Sec. 2, it is authorized to take into account only the requirements of consumers of gas within the State of West Virginia.

The answers admit and the evidence establishes beyond peradventure that at the time the act was passed conditions were already such that the requirements of consumers in West Virginia could be met to the extent required by the act only by diverting to their use gas which otherwise would go to consumers in other States.

The act manifests the purpose of West Virginia to compel companies having control of natural gas produced in the State to supply West Virginia consumers to the extent of their requirements, diverting or retaining so far as is necessary for that purpose the gas that otherwise in the ordinary course of business would go to other States. It creates, sanctions and makes provision for the procedure designed to effect this purpose, and there is no doubt that these sanctions and this procedure are adequate to bring about the intended result.

The requirement upon the West Virginia Public Service Companies to supply fully the requirements of West Virginia consumers at the expense of consumers in other States is immediate, under penalty of suits for damages and proceedings before the Public Service Commission should they fail to observe the requirement. There is no discretion in the Commission to do otherwise than to order that the requirements of the act be observed. The case against West Virginia is complete. No further act on her part could manifest more clearly her intention to enforce the act. The statute is a continuing command to her administrative officials to enforce it. The Public Service Commission is merely her agent whose readiness to obey her commands must be presumed.

The great majority of cases in which suits have been brought to enjoin the enforcement of State laws on the ground of their unconstitutionality have been cases against State officers charged with the enforcement of the acts. In such cases the presumption has always been indulged that the officers will proceed to perform the acts which the statutes command. The theory of such suits against State officers is that they are personally threatening to commit wrongs for which the unconstitutional acts afford them no protection. But here the suits are against the State itself. The State itself has threatened to commit the wrong. It has laid its hand by legislative act upon all the gas produced within its borders, and no act on the part of the officers of the State or the Public Service Commission is necessary to show its intention or to connect it with the threatened wrong. If, therefore, upon such facts as are disclosed here, a suit against officers of the State or the Public Service Commission of the State to

enjoin the enforcement of the act would not be premature, *a fortiori* these suits which are against the State itself are not premature.

The cases show that, upon facts like those here disclosed, a suit to enjoin the officers of the State from enforcing the State law is not premature. The fact that by an unconstitutional statute, it is made the duty of a State officer to enforce it, creates such a presumption of his intention to enforce it that suit may be brought against him without waiting for any overt act, and may be brought against him before the act by its terms is in effect.

Ex parte Young, 209 U. S. 123.
Truax v. *Raich*, 239 U. S. 33.
Waite v. *Macy*, 246 U. S. 606.
Ludwig v. *Western Union Tel. Co.*, 216 U. S. 146.
Wilcox v. *Consolidated Gas Co.*, 212 U. S. 19.
Western Union Tel. Co. v. *Andrews*, 216 U. S. 165.
Los Angeles v. *Los Angeles City Water Co.*, 177 U. S. 558.
City of Minneapolis v. *Minneapolis Street Ry. Co.*, 215 U. S. 417.
Rast v. *Van Deman*, 240 U. S. 342.
Cincinnati v. *Cincinnati & Hamilton Traction Co.*, 245 U. S. 446.
Adams et al. v. *Attorney General of the State of Washington*, 244 U. S. 590.

(C) There is no basis for the contention that the right of the plaintiff States to sue is not complete until there has been a hearing before the Public Service Commission of West Virginia and a decision by that body.

If a public service commission has legislative power to impose rates a complaint that a rate is confiscatory is premature until final action fixing the rate has been taken by the commission, for until that time the matter is in the discretion of the commission, and it is not to be presumed that it will fix a confiscatory rate. (*Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210.) Likewise, if any other matter is in the discretion of the commission, a complaint cannot be made of a wrong exercise of discretion in the absence of a showing that there has been a wrong exercise of discretion. But where the rule to be followed by a commission or administrative officer is prescribed and obedience to the rule must bring about a wrongful result, the cause of action to enjoin the unlawful outcome is complete without waiting for an actual decision under the rule.

Waite v. *Macy*, 246 U. S. 606.

(D) In conclusion, a pertinent question to be considered is, when will the cause of action set up in the bills of complaint be complete if it is not complete to-day?

This Court has said substantially that it has jurisdiction over any controversy between States which is in its nature justiciable, and which if it arose between independent nations might properly be the subject of diplomatic representations, reprisal, or war. It is to be presumed that this Court would not dismiss a suit for the determination of such a controversy as premature if it has already reached such a stage that as between independent nations it might properly be the subject of diplomatic representations, reprisals, or war. The enactment by one nation of a law which will operate

in the ordinary course of its administration to the injury of another state or its citizens is ground for diplomatic representations, at least, without waiting for the results of its administration. (See representations made to the Kingdom of the Netherlands in *re* East Indian Oil legislation.) By the same rule the cause of action of the plaintiff States is complete to-day. And it must be complete to-day. The plaintiff States certainly do not have to await the consummation of the injury that they apprehend before they can bring their actions. If they cannot bring their actions now but need not await the consummation of the injury they apprehend, at what intermediate stage may their actions be brought? There is no intermediate stage at which the result of the act, if it is allowed to have its natural effect, will be more certain than it is to-day. It is true that there is a chance, perhaps a probability, that some "person" in West Virginia to whom the act is directed will resist and take the chances of the liabilities and penalties that it imposes, will seek and obtain injunctions against its enforcement so sweeping that through this intervention the States of Pennsylvania and Ohio and their people will indirectly obtain protection. Are the plaintiff States premature in bringing their actions without waiting to see whether such a thing will come to pass? Neither they nor their people can resort to the courts in West Virginia, whether State or Federal, for relief. It is submitted that they have a right to come before this Court for the protection of themselves and their peoples, and need not wait on the chance that they will be incidentally protected by injunctions obtained by private persons in their own interest.

LAST POINT.—The plaintiffs should have decrees in accordance with the prayers of their bills of complaint.

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